SEOK MEE SEONG

v.

AB WAHAB AB RAHMAN

HIGH COURT MALAYA, SEREMBAN
MUSTAPHA HUSSAIN J
[CIVIL REVISION NO. 13-10 OF 1988]
19 SEPTEMBER 1988

CIVIL PROCEDURE: *Judgment in default - Application to set aside - Claim for cost of repairs to motor car - Definite amount - Whether claim debt or liquidated sum - Judgment given by Magistrate final and not interlocutory - Whether judgment irregular.*

The respondent/plaintiff's claim against the applicant/defendant was for cost of repairs carried out to his motor car, adjusters' fees and costs incurred allegedly as a result of the negligent driving of applicant/defendant. The learned Magistrate, Magistrate's Court, Rembau entered final judgment in default on the claim when the applicant/defendant and his Counsel were not present in Court.

The applicant/defendant applied to the Magistrate to set aside the final judgment in default as the judgment was irregular and as the applicant/defendant was entitled *ex debito justitiae* to have it set aside. The learned Magistrate dismissed the application. Hence, this revision.

Held:

[1] The Court is of the same view as V.C. George J in his judgment in the case of *Mahindar Singh v. Amanah Saham Pahang Bhd. & Anor*. [1984] 2 CLJ (Rep) 205 a case on all fours with this case, succinctly reasoned and held that the words "debt or liquidated demand" do not extend to unliquidated damages even if that amount of damages is a definite figure.

[2] In this case, even though the plaintiff's claim for cost of repairs to the damaged car has been quantified and definite figure given it does not come within the meaning of "debt or liquidated damages (see *Knight v. Abbot* 10 QBD 111).

[3] The learned Magistrate should have allowed the application to set aside the default judgment and leave given to the applicant/defendant to defend the action subject to the applicant paying costs.

[4] The judgment in default ordered by the learned Magistrate is therefore set aside and the applicant given seven days from date of this judgment to file his appearance and defence and pay the respondent/plaintiff RM300 being costs occasioned by the applicant not being present on the day the judgment was entered.

[Judgment in default set aside.]

Cases referred to:

Mahindar Singh v. Amanah Saham Pahang Bhd. & Anor. [1984] 2 CLJ (Rep) 205
Knight v. Abbot 10 QBD 11
Seng Huat Hang Sdn. Bhd. v. Chee Seng & Co. Sdn. Bhd. [1986] CLJ (Rep) 760
Evans v. Bartlam [1937] AC 473

For the applicant/defendant - V.T. Singam; M/s. Lawrence Dhillon & Associates
For the respondent/plaintiff - in person.

JUDGMENT

Mustapha Hussain J:

The respondent is the owner of car No. WG 2957 which was involved in a road accident with applicant's Mercedes car No. CA 2497 at about 3.20 p.m. on 26 May 1987 near the Balai Bomba in Rembau. According to respondent's police report (No. 1038/87 Balai Polis Pedas) the applicant's car knocked into his car from the back.

The applicant too made a report (No. 1039/87, Balai Polis Pedas) saying that the respondent driving in front of him suddenly applied brakes and the applicant had no time to stop his car as at that time he was cleaning the windscreen. It was raining at that time.

A letter dated 28 September 1987 from the OCPD Tampin confirmed that the applicant was summoned under r. 10 of LN 166 of 1959 and was compound fined RM75.

The respondent obtained an estimate of repairs to repair his damaged car from R.T. Lingam Insuran Adjusters (M) Sdn. Bhd. who estimated the costs of repairs of the car at RM1,727,71 and the adjuster's bill amounted to RM142.50. (a breakdown of the damages and estimated costs of repairs together with the adjuster's bill can be found in the adjuster's report dated 20 August 1987, annexed to respondent's affidavit dated 21 March 1988 (encl. 20). Respondent's car was subsequently repaired at the cost of RM2,471.20 (see invoice issued by Syarikat Wee Seng Motor, also annexed to affidavit encl. 20).

On 2 September 1987 the respondent filed a small claim Court Summons No. 06-1-87 in Second Class Magistrate's Court, Rembau. His claim was:

Statement of Claim

Ganti rugi kereta WG 2957 kerana kemalangan jalan raya disebabkan kelalaian pemandu.

Prayers

1.	Kerosakan kereta WG 2957	RM1,727.71
2.	Bayaran Adjuster	142.50
3.	Runcit dan setem	50.00
	Jumlah	RM1,920.21

The order to defendant i.e. to the applicant here was dated 2 September 1987 and was informed if the applicant disputed the claim he must file a statement of defence within two weeks from the date of receipt of the order. And in that order (in fact it is a notice) the date of hearing was stated to be 1 October 1987. But the date of hearing at the end of the order, the date "1" had been over written to read "8". Presumably the actual date of hearing was 8 October 1987.

The order to the defendant i.e. the applicant here was sent by AR registered post and Messrs Lawrence, Dhillon & Associates wrote a letter dated 7 October 1987 to the Magistrate's Court, Rembau, which was received by the Court on 8 October 1987, the date of hearing of the case, asking the case to be transferred to the First Class Magistrate's Court as they wished to represent the defendant (the applicant here). No formal application is necessary to apply for the transfer. Accordingly a new date of hearing was fixed to 12 November 1987 for mention and also for the applicant here to enter his appearance and defence - see letter dated 8

October 1987 from the Court whereby the applicant's solicitors were also informed that the case had been transferred to First Class Magistrate's Court and re-numbered (R) G. Sibil No. 89-29-87.

On 20 October 1987 applicant's solicitors wrote to the Court (the letter was received by the Court on 24 October 1987) asking the Court to direct the plaintiff (the respondent here) to file a summons and statement of claim so that the applicant's solicitors could file the defence.

The Court by letter dated 2 November 1987 informed applicant's solicitors that the statement of claim (using Borang 164 A under the small claims Court) had been served on the applicant and there was no necessity to file a fresh summons and statement of claim as this was a small claim Court case being transferred to the First Class Magistrate's Court. By the same letter the applicant's solicitors were advised to file the applicant's defence before 12 November 1987, the date fixed for mention of the case.

On 12 November 1987, the date for mention, the plaintiff (respondent here) was present. The defendant (applicant here) was absent and his solicitor was also absent. Also there was no defence filed. The learned Magistrate therefore gave judgment in default of defence in the sum of RM1,910.21 and costs of RM20.

By letter dated 20 November 1987 (which was received by the Court on 2 December 1987) applicant's solicitors applied to the Court to set aside the judgment in default and for leave to enter appearance and to defend the case. The application was fixed for hearing on 28 January 1988. As the application had not been served on the plaintiff (respondent) the hearing was adjourned to 3 March 1988 when the plaintiff (respondent) asked for time as he was just served with the application. It was then adjourned to 7 April 1988.

On 7 April 1988 the learned Magistrate after hearing the application to set aside the judgment dismissed it and awarded costs of RM20 to the plaintiff (respondent).

The solicitors for the applicant (defendant in the Court below) have now applied to this Court for Revision. Two points were raised before this Court which were also raised before the learned Magistrate at the hearing of the application to set aside. These are:

(1) As the claim is not a debt or liquidated sum therefore the judgment given by the learned Magistrate should be an interlocutory judgment and not a final judgment. The final judgment is this case is therefore irregular.

(2) Even if the judgment in regular, there is defence on the merits as disclosed in the draft defence filed leave to defend should be granted subject to costs.

V.C. George J in his judgment in the case of *Mahindar Singh v. Amanah Saham Pahang Bhd. Anor*. [1984] 2 CLJ (Rep) 205 a case on all fours with ours, succinctly reasoned and held that the words "debt or liquidated demand" do not extent to unliquidated damages even if that amount of damages is a definite figure. This Court is of the same view.

In our case the respondent's (plaintiff) claim is for costs of repairs to his damaged car. There are 15 items of repairs (see invoice of Syarikat Wee Seng Motor). Were all these items of repairs and or replacement of parts necessary or were the replacements of parts and repairs carried out as a result of the accident? Even though the claim here has been quantified and definite figures given, it does not come within the meaning of "debt or liquidated damages" (see *Knight v. Abbot*, 10 QBD 11).

In an application to set aside a judgment in default, the explanation as to why the defendant or his Counsel was absent is relevant but not the deciding factor. What is important or crucial (as Edgar Joseph Jr. J said in *Seng Huat Hang Sdn. Bhd. v. Chee Seng Co. Sdn. Bhd.* [1985] CLJ (Rep) 760 is whether there is defence on the merit. The draft defence enclosed with the application discloses triable issue within the meaning of *Evans v. Bartlam* [1937] AC 473. The learned Magistrate should have allowed the application to set aside and leave given to the applicant to defend the action subject to the applicant paying costs.

The judgment in default ordered by the learned Magistrate here is therefore set aside and the applicant given seven days from today to file in his appearance and defence.

As regards costs, the applicant here must bear the costs. The applicant is ordered to pay RM300 to the respondent (plaintiff) being costs occasioned by him not being present on the day the judgment was entered and to pay the same within seven days from today.

Also found at [1988] 2 CLJ 694